No. 19-309

# In The
# Supreme Court of the United States

GOVERNOR OF DELAWARE,

*Petitioner,*

v.

JAMES R. ADAMS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR RESPONDENT JAMES R. ADAMS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the First Amendment to the Constitution of the United States violated by a provision of Delaware's Constitution of 1897 which discriminates by excluding anyone who is not a member of a "major political party," *i.e.*, a Republican or Democrat, from appointment as a judge?

2. Is the First Amendment violated by a provision of Delaware's Constitution of 1897 which discriminates by excluding applicants from appointment as a judge when members of the applicant's political party already have a "bare majority" of representation on Delaware's courts?

3. Did the U.S. Court of Appeals for the Third Circuit properly apply Delaware's common law severability jurisprudence in determining that the "bare majority" provision is not severable from the provision excluding those who are not Republicans or Democrats?

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## INTRODUCTION

"If there is any category of jobs for whose performance party affiliation is not an appropriate requirement, that is the job of being a judge, where partisanship is not only unneeded but positively undesirable." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92-93 (1990) (Scalia, J., dissenting).

"I am heartened by the support I have received from people who recognize that there is no such thing as a Republican judge or a Democratic judge. We just have judges in this country." The Hon. Neil Gorsuch, Confirmation Hearing transcript at 70, Mar. 21, 2017.[1]

Notwithstanding these irrefutable truths, Petitioner asks this Court to approve a system of judicial appointment, unique to the State of Delaware, which mandates that only Democrats and Republicans can be judges, and also limits their proportionate numbers on the courts. Such a system assumes, without foundation, that Republicans and Democrats are monolithic in their judicial views and that their political views will control their decision-making. Worse, it reinforces the fears of the public that judges will decide cases based on political affiliation. This is anathema to the concept of an independent judiciary that is free "to make case decisions without outside influence." "*Why A Fair And Independent Judiciary Matters,*" 2007 Annual Report of the Delaware Judiciary.

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[1] https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf.

Petitioner does not claim that the Third Circuit misunderstood or misinterpreted the legal principles set down by this Court in the patronage cases.[2] He only disagrees with the conclusion arising from the application of those legal principles.

The ruling Petitioner seeks to have this Court review involves a law unique to Delaware. No other State excludes minority parties from appointment as judges. No other State requires political balance on their courts.

The cases relied upon by Petitioner all deal with temporary appointments pending the next judicial election, whereas this case involves appointment by the Governor for a full term, with no judicial elections.

The issue of political balance on Delaware's courts was decided by the Third Circuit on state law grounds. Matters of state law are not a proper basis to grant a writ of certiorari.

For these reasons, the Petition for a Writ of Certiorari should be refused.



## STATEMENT OF THE CASE

James Adams, a member of the Delaware State Bar, is an Independent voter who desires a judicial

[2] *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

position. *Adams v. Governor of Delaware*, 922 F.3d 166, 172 (3d Cir. 2019).

Throughout his career, Adams was an active registered Democrat. In early 2017, that changed, as Adams became an Independent voter for the first time. Adams explained that he changed his affiliation because he is progressive and grew frustrated with the centrism of the Democratic Party in Delaware. *Id.*

In 2014, Adams considered applying for judicial positions on the Supreme Court and the Superior Court; however, at the time he was registered as a Democrat and the positions were open only to Republican candidates. Shortly thereafter, in 2015, Adams retired and assumed emeritus status with the Delaware State Bar. By 2017 he felt ready to resume searching for a judicial position, and believed he was a qualified applicant. He therefore returned to active status in 2017. *Id.*

In 2017, two additional judgeships became open, both for only Republican candidates. *Id.*

Since Adams is not and has not been a Republican, he was inhibited from applying, as any application he would make would be immediately rejected, and so applying was futile. *Id.*

## REASONS FOR DENYING THE PETITION

### I. The Effect of the Decision of the Third Circuit Is Limited to the State of Delaware and Does Not Need to Be Settled by This Court.

#### A. The "Major Political Party" Provision.

This action involves a provision of Delaware's Constitution prohibiting appointment of an applicant as a judge if the applicant is not a Republican or Democrat (the "Major Party provision"). Del. Const. Art. IV §3. No other State Constitution or Code has a similar politically discriminatory provision for the appointment of judges for a full term.

Unlike this case, the cases cited by Petitioner all involved circumstances where the Executive made a voluntary choice to use party affiliation as a criterion in selecting temporary judges, in most cases to fill the remainder of a vacated elected judge's term until the next election, when the voters get to choose.[3]

As Delaware is the only State requiring that only Republicans or Democrats be appointed as judges, a decision in this action will not affect anyone outside the State of Delaware. The issue will not recur

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[3] *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1998); *Davis v. Martin*, 807 F.Supp. 385 (W.D.N.C. 1992); *Levine v. McCabe*, 2007 WL 4441226 (E.D.N.Y. Dec. 17, 2007); *Carroll v. City of Phoenix*, 2007 WL 1140400 (D. Ariz. Apr. 17, 2007); *Walsh v. Heilman*, 2006 WL 1049598 (N.D. Ill., Apr. 19, 2006), *aff'd*, 472 F.3d 504 (7th Cir. 2006); *Garretto v. Cooperman*, 510 F.Supp. 816 (S.D.N.Y. 1981), *aff'd mem.*, 794 F.2d 676 (2d Cir. 1984).

frequently across the country or consume substantial judicial resources.

### B. The "Political Balance" Provision.

Delaware's Constitution also requires that its courts have a majority of no more than one member of the same political party (Republicans and Democrats only) (the "Political Balance" provision). Del. Const. Art. IV §3. No other State mandates political balance on its courts. As such the reasoning set forth above applies here as well.

Recognizing this fact, Petitioner argues that state and federal regulatory agencies and judicial nominating committees often have political balance requirements. However, Petitioner concedes that such regulatory agencies make policy, and therefore fall within the *Elrod/Branti* exception. As the Third Circuit noted in responding to this same argument, "unlike elected officials and agency representatives who explicitly make policy, judges perform purely judicial functions. Further, it is difficult to see how the logic of political balance and minority representation extends from multimember deliberative bodies, like a school board, to Delaware's judiciary, most of whom sit alone." *Adams*, 922 F.3d at 182 & n.80.

In any event, this aspect of the Third Circuit's ruling was decided under Delaware law, not federal law. As such, the federal issue is not ripe and should await resolution in Delaware by the political process. A

matter of Delaware law does not provide grounds for accepting a petition for a writ of certiorari.

## III. Petitioner Merely Seeks Correction of a Purported Misapplication of a Properly Stated Rule of Law.

The Third Circuit based its decision on the merits on *Elrod* and its progeny, the patronage cases. *Adams*, 922 F.3d at 175-85.

Petitioner does not claim that the Third Circuit misinterpreted the rulings of those cases. Rather, Petitioner complains that in applying the law of those cases the Third Circuit reached an outcome with which he does not agree. *See* Petition at 10 ("the Third Circuit expressly acknowledged that it created a circuit split *on the application of Elrod and Branti to judicial appointments*," italics added).

Indeed, the only language from the Third Circuit's opinion which Petitioner appears to have a disagreement with is the statement that the *Branti* exception applies "to only the class of employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" Petition at 10 (quoting *Adams*, 922 F.3d at 181).

Yet this language echoes the language in *Branti* that party affiliation may be relevant if "the official duties . . . cannot be performed effectively unless those persons share his political beliefs and party commitments." 445 U.S. at 518.

Petitioner's position is in fact foreclosed by *Branti*. In *Branti*, this Court held that political affiliation was not an appropriate requirement for the position of an assistant public defender. In reaching that conclusion, this Court reasoned that:

> whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.

445 U.S. at 519.

Similarly here, "whatever decisions judges make in any given case relates to the case under review and not to partisan political interests." *Adams*, 922 F.3d at 169.

## III. There Is No Genuine Circuit Split.

The cases from other circuits cited by Petitioner to claim the existence of a circuit split are factually and legally distinguishable.

First, Petitioner's cases do not involve mandatory political discrimination. Rather, the Governors in those

cases chose to select judges based, in part, on party affiliation.[4] Petitioner does not have such discretion.

Second, the present case deals with appointment to a full term as a judge. Petitioner's cases involve temporary appointments to elective judicial positions. In the case of elected judges, the dangers of political patronage are removed as any temporary appointments are subject to approval by the voters at the next election. As such, the rationale of *Elrod* and its progeny is inapplicable. *See, e.g.*, *Newman v. Voinovich*, 789 F.Supp. 1410, 1420 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993) ("The other matter which distinguishes this case and the appointment process from *Elrod* and its progeny is the fact that within a matter of months the appointee is called upon to face the electorate to determine whether he or she is suitable to retain the position to which he or she has been appointed. The specific employment decisions in *Elrod, Branti* and *Rutan* are never subject to approval by the people of the state").

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[4] *See* footnote 1. The one exception is *Davis*, where a statute mandated that, in the case of an elected judge, a vacancy must be filled by someone of the same political party as the vacating judge. The District Court went out of its way to note that maintaining same political party "preserves the voters' political party choice for that particular office." 807 F.Supp. at 387. The Court went on to note that the statute only applies where the vacating judge is elected, and did not apply where the judge was appointed or where the vacating judge was elected as an independent. *Id.* Indeed, the Court noted that the plaintiffs in *Elrod* and *Branti* "were not subject to approval by the people of the state through elections." *Id.*

Third, none of Petitioner's cases explain how "party affiliation is an appropriate requirement for the effective performance of the public office involved," which is the central question. *O'Hare Truck Service, Inc.*, 518 U.S. 719; *Branti*, 445 U.S. at 518.[5] *See also id.* (The test "would simply rest on the fact that party membership was *essential* to the discharge of the employee's governmental responsibilities," italics added).

Fourth, all of Petitioner's cases appear to ignore the rationale for the "policymaker" exception, *i.e.*, to ensure that those employees will promote and implement the agenda of the administration. *Elrod*, 427 U.S. at 367 (government entity has interest in preventing employees from "obstructing the implementation of

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[5] It is noteworthy that in one of the cases cited by Petitioner, in determining whether a workers compensation judge is a policymaker, the District Court noted that "[i]f *Branti* is to be read literally, however, the policymaking responsibilities of the job are of no consequence. The only issue that matters is whether membership in a particular party is a requirement for the effective performance of the duties of the office. *It is absolutely clear that party affiliation is not a requirement for the effective performance of the duties of the office of Compensation Judge*." *Garretto*, 510 F.Supp. at 819 (italics added).

Notwithstanding this, the District Court rejected *Branti*, concluding that this Court would not adhere to it, and so found the judge a policymaker under a pre-*Branti* analysis. *Id.* at 820. This Court subsequently disproved the District Court by reaffirming *Branti's* statement that the real question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *O'Hare Truck Service, Inc.*, 518 U.S. at 719. Thus, *Garretto* supports the conclusion that, under *Branti*, political affiliation is not an appropriate requirement for the effective performance of a judge.

policies of the new administration"); *Rutan*, 497 U.S. at 74 (government entity has interest in "securing employees who will loyally implement its policies").

Judges do not work with elected officials to implement such officials' policies because such activity is an executive, not a judicial, function.

Petitioner attempts to argue that "[t]he Court's opinion in *Branti* specifically approved of a partisan balance provision for judges," calling it "obvious" that such a provision would be valid, then quoting language from *Branti* referring to election judges. Petition at 8-9, quoting *Branti*, 445 U.S. at 518. *Branti* did not equate election judges to members of the judicial branch. Election judges, engaged in a partisan battle, are intended to act and advocate to protect the interests of their respective parties. *See Lehner v. O'Rourke*, 339 F.Supp. 309, 314-15 (S.D.N.Y. 1971) ("Each candidate would have inspectors who were members of his own political party to keep an eye on each other"); *MacGuire v. Houston*, 717 P.2d 948 (Colo. 1986) ("the antagonism between the two parties results in a system of monitoring").

By contrast, members of the judicial branch do not advocate for one side or the other, but are tasked to reach an independent decision based on the facts and the law.

There is no circuit split on the "Political Balance" provision either, as no other state has such a law pertaining to judges and there is no other judicial decision on the issue.

## IV. This Court Does Not Grant Petitions for Certiorari to Review the Application of State Law.

The Third Circuit struck down the Bare Majority provision on the ground that it could not be severed from the Major Party provision. In so doing, the Third Circuit applied Delaware's principles of construction.

Generally, this Court does not grant petitions for certiorari to review the application of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). Nothing justifies making an exception here. Petitioner does not claim that applying Delaware law violated any principle of federal law. He does not claim that the Third Circuit mis-applied Delaware law. He does not claim that use of Delaware law was improper.

## V. Petitioner Has Failed to Establish That the Political Balance Provision Advances a Vital Government Interest and That it Is Narrowly Tailored to Serve That Interest.

Petitioner argues that the Political Balance provision serves Delaware's interests in (i) protecting its sovereign authority to determine qualifications for judges, and (ii) maintaining the fairness, consistency and balance of its courts. Petitioner's claims are not supported in fact or logic.

### A. Exacting Scrutiny Applies.

A significant impairment of First Amendment rights must survive "exacting scrutiny." The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Elrod*, 427 U.S. at 362-63.

Petitioner argues that this "exacting scrutiny" standard is lowered when evaluating the qualifications for certain government positions, citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregor*y, however, was not a First Amendment case. It was a Fourteenth Amendment/Equal Protection case, which of itself applies a lower standard of review than First Amendment cases. Petitioner has not identified any cases applying the "political function exception" to First Amendment claims. As such, *Gregory* is inapplicable.

### B. A State's Interest in Sovereignty Must Yield to the First Amendment.

Although Delaware is a sovereign state, it may not exercise its sovereign powers in a manner that infringes on federal constitutional guarantees. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). As such, the desire to protect state sovereignty must be subordinate to rights granted under the First Amendment.

If Delaware law restricted judgeships by race, religion or gender, state sovereignty would not protect the law from being declared unconstitutional. *Illinois State Employees Union, Council 34, Am. Federation of*

*State, County and Municipal Employees, AFL-CIO v. Lewis*, 473 F.2d 561, 567 (7th Cir. 1972) ("It is well settled that our duty to accord appropriate respect to a state's sovereignty does not require us to accord finality to a decision to dismiss an employee for an impermissible reason, or to a policy of discrimination against members of a particular race, religion, or political faith in the award or withholding of public benefits"). It should be no less so in the case of political affiliation, which is a core freedom.

### C. Nothing in the Record Justifies the Assertion That the Political Balance Results in a Superior Judiciary.

Petitioner frequently makes the claim that the political balance requirement has resulted in better decisions and has helped secure the reputation of Delaware's judiciary. However, there is nothing in the record that supports that conclusion.

Petitioner cites a number of law review articles written by present and former Delaware judges (who have an interest in promoting their home state as a venue for litigation). The quoted excerpts from those articles do not cite to any studies, polls or even anecdotal data. In the absence of proof, the conclusory assertion that the Political Balance provision has had any effect on the quality or esteem of the Delaware judiciary, as opposed to the merits of individual judges, is mere self-promotion.

### D. Political Balance in the Court Does Not Promote Public Confidence in the Judicial System.

In *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015), the Seventh Circuit struck down on First Amendment grounds an Indiana statute that established a system for the election of judges to the Marion Superior Court which resulted in half the judges being Republicans and half being Democrats.

In so doing, the Seventh Circuit rejected the State's argument that partisan balance promotes compelling interest in promoting public confidence in the impartiality of the bench:

> Partisan balance amongst the judges who comprise the court, alone, has little bearing on impartiality. For instance, let's assume that the court included two equally ultra-partisan, biased judges who allowed their political affiliation to influence their conduct and decisions. One judge is partial for Republican interests; the other for Democratic interests. Once the public became aware of the two problem judges, their confidence in the impartiality of the court would not be restored by the fact that the court still has overall partisan balance. Rather, calls would be made for the removal of both judges and their replacement with judges who would fairly and impartially decide cases, regardless of any political affiliation. If the ratio of ultra-partisan, biased judges was extended to 2 to 2, 3 to 3, or even

18 to 18 (comprising the entire court), the public would become increasingly less confident in the impartiality of the court, notwithstanding that the court still enjoys partisan balance between the major political parties. Simply stated, partisan balance can serve as a check against contrary partisan interests, but it says little about the impartiality of individual members.

Further, we note that the policy reasons offered by the State in support of the Statute – namely, to promote public confidence in the impartiality of the court by preventing one party from sweeping all of the seats – are not supported by the record. The State contends that if one party were to have majority control of the seats on the court, litigants of other political affiliations would feel as though the odds were stacked against them. However, there is nothing in the record to substantiate a claim that partisan balance on the court is necessary to serve that interest, or that such a concern has ever been raised. Even during the 1970 and 1974 elections in which each major party swept all of the seats, we are not presented with any evidence that a litigant complained of bias or prejudice on the part of a judge based upon party affiliation, or that all the judges on the court had the same party affiliation. It is asserted that the Statute, and its accompanying burden on the right to vote, is necessary to protect and promote public confidence in the impartiality of the bench, but this presumes that nothing protected these interests before the Statute. The Indiana

> Code of Judicial Conduct contains numerous rules and provisions designed to ensure the independence, integrity, and impartiality of the court, including detailed restrictions on political activity by judges and judicial candidates. Ind. Code of Judicial Conduct Canon 4 ("A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."). Although the Code of Judicial Conduct has gone through revisions over the years, requirements that judges refrain from certain political activities and decide cases impartially, without personal bias or prejudice, predate the Statute. See, e.g., Indiana Code of Judicial Conduct (effective January 1, 1975). Furthermore, complaints about judicial misconduct for violations of the Code may be filed with the Indiana Commission on Judicial Qualifications, which investigates and recommends discipline, where appropriate, to the Indiana Supreme Court.
>
> We disagree that partisan balance in the context of judicial elections improves the public's confidence in an impartial judiciary. The emphasis on partisan balance could just as easily damage public confidence in the impartiality of the court.

*Id*. at 924-25.

The analysis is no less true in the context of appointed judges.

There are 49 other states whose laws do not require political balance for judges, and yet there is no evidence that this has resulted in a loss of quality or public confidence.

Political balance also does not serve the claimed purpose of preventing one party from dominating a court. First, Delaware trial courts are single-judge courts and assignment of cases is by the President Judge, who is of a single political party. Delaware Judicial Branch Operating Procedures §IV(2). https://courts.delaware.gov/aoc/operating-procedures/op-casemgmnt.aspx#judges. Delaware Supreme Court cases are heard in either panels of three, the compositions of which are assigned randomly, Delaware Supreme Court Internal Operating Procedures, §IX(2), or en banc in panels of five. In either case judges of one political party dominate the panel. Thus, the law currently allows political domination, and does not remove it. As one scholar has noted:

> Of those three courts, only the Delaware Supreme Court is a collective body. The adjudication of civil and criminal appeals is categorically different than functioning as a partisan representative for promulgating election-related regulations or resolving real-time disputes at a polling place. The appellate process is not designed to reflect the partisan views of the appellate judges. Otherwise, a three–two partisan majority would have license to rule routinely in a partisan fashion.
>
> On the Court of Chancery, each member of the court acts individually to find the facts,

> determine the law, and select a remedy. Given that individualized approach to case disposition, it is difficult to conceive how the partisan makeup of the remainder of the court renders the partisan affiliation of a particular candidate for a particular vacancy a "reasonably appropriate requirement" for the job.
>
> Any claimed importance for the partisan makeup of the Superior Court is undercut by the right to a jury trial in a Superior Court action, as well as by the absence of collective decision-making. The Superior Court is a court of general jurisdiction, and neither civil plaintiffs nor criminal defendants have a right to a near-50% probability of drawing a Democrat or Republican judge in a given case.

Joel Edan Friedlander, "*Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary*," 58 Ariz. L. Rev. 1139, 1157-58 (2016).

"In the discharge of his duty, a judge is not concerned with party platforms or party expediency. In his official capacity he can serve no party, promulgate no partisan theories of government, encourage no partisan economic measures." *State ex rel. Weinberger v. Miller*, 99 N.E. 1078, 1085 (Ohio 1912).

### E. Deciding Cases Does Not Involve Creating or Implementing Executive Policy.

Petitioner argues that deciding cases constitutes making policy. Of course, this activity is (and should be) independent of the other branches of government.

Moreover, in fashioning common law and interpreting statutes, there are strictures in place to prevent judges from having the latitude actual policymakers have:

> Principles of judicial restraint that govern the judicial branch turn on what Professor Wechsler called the application of "neutral principles," Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14, 16 (1959), and what, more recently, Judge Tatel has referred to as "those principles of judicial methodology that distinguish judging from policymaking" – principles that include stare decisis (following precedent), "faithful[ness] to constitutional and statutory text and to the intent of the drafters," and appropriate deference to "the policy judgments of Congress and administrative agencies." David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L.R. 1071, 1074 (2004). Although faithfulness to these principles sometimes can be frustrating, they also can, as Judge Tatel explained, be "immensely reassuring. . . . Although [judges] have personal views about such questions, we have neither the expertise to resolve them nor the accountability to the electorate for doing so." Id. at 1075.
>
> These methodological constraints . . . mean that we judges sometimes sustain actions we think make little sense, invalidate programs we like, or apply precedents we believe were wrongly decided. . . . In all these cases, though we may have been troubled by the outcomes, we knew that vindicating the rule of law was

> far more important to our constitutional system than the issues at stake in any particular case.

*Pigford v. Veneman*, 355 F.Supp.2d 148, 169-70 (D.D.C. 2005) (citation omitted).

Moreover, any "policymaking" that judges do is limited to the case before them, and does not extend to any partisan interest. *Branti*, 445 U.S. at 519.

### F. Petitioner Made No Effort to Show That the Political Balance Provision Was Narrowly Tailored So That It Was the Least Restrictive Way to Protect Any Vital Interests.

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

*Elrod*, 427 U.S. at 363.

The Third Circuit found that Petitioner failed to explain why the Political Balance provision is the least restrictive means to protect its interests. *Adams*, 922 F.3d at 183.

Petitioner does not challenge that finding. Instead, he faults the Third Circuit for not providing less

restrictive alternatives. Petition at 34. Yet it is not the Court's burden to provide such alternatives. The burden was on Petitioner to show that there were no less restrictive alternatives. He failed to do so below and in his Petition he gives no indication that he can do so here.

## CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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